(26,798)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 712.

GEORGE E. BURNAP, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 10, 1919.

1

In the Court of Claims.

No. 33672.

GEORGE E. BURNAP

v.

THE UNITED STATES.

I. *Amended Petition.*

(Original Filed October 19, 1916; Amended Filed November 16, 1917.)

To the Honorable the Court of Claims:

The Claimant, George E. Burnap, respectfully represents:

I. Th eclaimant was on the 3d day of May, in the year 1910, after a special civil service examination in which he ranked first from among more that 70 applicants, appointed by the Secretary of War to the position of landscape architect in the office of Public Buildings and Grounds, and entered upon his duties on the 1st of July, 1910, the office being one to which the appointee was subject to appointment and removal by the Secretary of War and by no other authority; and continued from that date for more than three years to receive constant commendation from those in official authority over his work.

II. On the 14th day of September, in the year 1915, upon charges being preferred against him by Colonel William W. Harts, U. S. A., in charge of the office of Public Buildings and Grounds, claimant was, without legal or proper authority, suspended from duty and was not allowed to receive any salary; and has not received any salary from that date to the date of the filing of this petition.

2 The charges were shortly after that date brought to the personal attention of the Secretary of War, Hon. Lindley M. Garrison, then occupying that office, who referred them to the Judge-Advocate-General of the Army, who reported:

"Taking the charges as a whole, I find no specific instances of misconduct proved. As to one or two points, I think Mr. Burnap has justified himself; as to the rest, it is not yet possible to form a fair opinion. This is largely because a definite statement was not given to Mr. Burnap in the first place, so that he might make an equally definite answer; some grounds of complaint are set forth for the first time in the memorandum which Mr. Burnap has never seen, and others are not even yet clearly formulated."

* * * * * * *

"If his conduct has actually been such as to warrant his dismissal, that fact has still to be proved."

Secretary Garrison took no action up to the time when he resigned from office.

The matter was taken up by his successor, Hon. Newton D. Baker, who, on April 12, 1916, wrote a letter to the claimant, quoting the statement of the Judge-Advocate-General above partially quoted, and stating:

"I am willing to accept your resignation without prejudice and will be glad to write you a letter stating that you have separated yourself from the service and that your going does not reflect on your competency or upon the services you have rendered, but that your resignation is made because of temperamental incompatability between you and your chief."

After some inconclusive interviews and correspondence, the claimant on the 2d of August, 1916, was by action of the Chief of Engineers, ordered to be removed from office, but not by virtue of any charges having been properly established against him, nor
3 by authority or direction of the Secretary of War.

Claimant claims that the attempt at removal was ineffectual and void.

III. This claim has been submitted to the Auditor for the War Department and by him disallowed, and the disallowance on appeal affirmed by the Comptroller of the Treasury on September 27, 1916.

IV. Although the claimant was constantly ready and willing to perform the duties of his office he was not allowed to do so from the date of his attempted suspension on the 14th day of September, 1915, by the officer in charge of the Office of Public Buildings and Grounds nor was he removed therefrom by the Secretary of War. No appointment was made by the said Secretary of War to the office of landscape architect until the 20th day of July, 1917, when by order of the Secretary of War Charles P. Punchard was appointed to the office of landscape architect and took the oath of office on the 30th day of July, 1917.

The claimant therefore claims his salary at the rate of $2,400 a year from the 14th of September, 1915, to the 29th of July, 1917, amounting to $4,506.66.

V. This claim is based upon and made under the following provisions of law:

Revised Statutes, Sec. 169, conferring appointing power upon the heads of the departments.

Act of January 16, 1883, 22 Stat. 403, regulating and improving the civil service of the United States.

Act of June 17, 1910, 36 Stat. 504, authorizing and appropriating for "Lanscape architect, $2,400," together with successive appropriations under "Public Bulidings and Grounds" contained in the legislative, executive and judicial appropriation acts for 1911,
4 1912, 1913, 1914, 1915 and 1916.

Act of August 24, 1912, Sec, 6, 37, 555, providing for written charges, written answer to the same, and order of removal in the case of all persons in the classified civil service of the United States.

No other action has been had on said claim in Congress or by any of the departments; no person other than the claimant is the owner thereof or interested therein; no assignment or transfer of this claim or of any part thereof or interest therein, has been made; the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; the claimant has at all times borne true allegiance to the government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government. The claimant is a citizen of the United States. And the claimant claims four thousand five hundred and six dollars and sixty-six cents ($4,506.66).

KING & KING,
Attorneys for Claimant.

DISTRICT OF COLUMBIA, *ss:*

George E. Burnap, being duly sworn, deposes and says: I am the claimant in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge and belief.

GEORGE E. BURNAP.

Subscribed and sworn to before me this 15th day of November, 1917.

[SEAL.] MARIE A. SEARLES.
Notary Public.

5 II. *General Traverse.*

Court of Claims.

No. 33672.

GEORGE E. BURNAP

v.

THE UNITED STATES.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by rule 34,

6 III. *Argument and Submission.*

This case was argued on the 6th day of March, 1918, by Mr. George A. King for the claimant and by Mr. Harvey D. Jacob for defendants, and submitted.

7 IV. *Findings of Fact and Conclusion of Law and Memorandum.*

Court of Claims of the United States.

No. 33672.

GEORGE E. BURNAP

v.

THE UNITED STATES.

(Decided June 17, 1918.)

This case having been heard by the Court of Claims the court, upon the evidence, makes the following

Findings of Fact.

I.

The plaintiff, George E. Burnap, was appointed by the Secretary of War landscape architect in the Office of Public Buildings and Grounds. He took the oath of office and entered upon duty July 1, 1910.

Friction having arisen between plaintiff and his immediate superior officer, the officer in charge of the office of Public Buildings and Grounds on September 14, 1915, addressed a communication to the plaintiff stating: "You are hereby suspended from duty and pay as landscape architect in this office, to take effect from to-day, pending final action upon charges against you to be preferred to the proper authorities with a view to your dismissal from the service for cause. You will be allowed until September 24 to make a reply to the charges specified below, at which time the subject will be submitted to the department." Accompanying said communication were charges in writing, and in general terms, of inefficiency, disobedience of orders, evasion, and lack of adaptablility, and under each of said charges were a number of more or less definite specifications.

Plaintiff answered the charges in writing and under oath. On September 28, 1914, the officer in charge of the Office of Public Buildings and Grounds submitted said correspondence to the Chief of Engineers, together with a memorandum prepared by Col. William W. Harts, and a statement that "In view of these facts I feel compelled to recommend that Mr. Burnap be discharged for the good of the service."

Said charges were submitted by the Chief of Engineers to the Secretary of War, who, at plaintiff's request, directed that the charges be submitted to him for consideration. The case was thereupon referred by the Secretary of War to the Judge Advocate General, and on October 19, 1915, the Judge Advocate General made a

8 memorandum for the Secretary of War dealing with said charges and answers, and suggested that, taking the charges as a whole, he found no specific instances of misconduct proved, and that *that* largely because a definite statement was not given to plaintiff in the first place, so that he might make an equally definite answer, and adding:

"There appear to me to be two courses which could be followed with justice to the parties concerned. One is to allow Mr. Burnap to resign, if he is willing to do so. His relations with his superior are now such that harmonious cooperation is impossible, however anxious each may be to reach it, and he may therefore be ready to end the situation. In that case he should be allowed to go without suggestion of any blot upon his record, for if his conduct has actually been such as to warrant his dismissal, that fact has still to be proved. If he is unwilling to resign, or it is considered inexpedient to allow him to do so, I recommend that Col. Harts's supplementary memorandum be referred to him that he may present his version of the matters therein treated; and that the opinions of competent observers be secured as to his efficiency and attention to duty in his present employment. Lieut. Col. Spencer Cosby, C. E., the officer under whom Mr. Burnap was originally employed here, would perhaps be the best judge of the value of his services. It is probable, too, that the members of the Fine Arts Commission are well acquainted with his capabilities."

On April 12, 1916, the Secretary of War, the Hon. Newton D. Baker, addressed a communication to the plaintiff, as follows:

"DEAR SIR: In the matter of the recommendation of Col. Harts, Superintendent of Public Buildings and Grounds, for your dismissal from the position of landscape architect, concerning which I have talked with you, I beg to inform you that I can not comply with the request contained in your letter of the 8th instant to grant you leave of absence without pay until such time as a change may occur in the position of Superintendent of Public Buildings and Grounds.

"In the review of the case made for Secretary Garrison by the Judge Advocate General, he reached the following conclusions:

" 'Taking the charges as a whole, I find no specific instances of misconduct proved. As to one or two points, I think Mr. Burnap has justified himself; as to the rest, it is not yet possible to form a fair opinion. This is largely because a definite statement was not given to Mr. Burnap in the first place, so that he might make an equally definite answer; some grounds of complaint are set forth for the first time in the memorandum which Mr. Burnap has never seen, and others are not even yet clearly formulated. But even if Mr. Burnap were cleared of all objectionable acts that are charged or suggested, there would remain a very serious question as to his fitness for his present position. One may have high abilities, may never be guilty of any infraction of orders or regulations, and yet perform his duties in such a perfunctory manner, give so grudging an attention to his work, that he is practically worthless. It is possible that Mr. Burnap is such a man; if so, satisfactory proof should not be difficult to obtain.

" 'There appear to me to be two courses which could be followed with justice to the parties concerned. One is to allow Mr. Burnap to resign, if he is willing to do so. His relations with his 9 superior are now such that harmonious cooperation is impossible, however anxious each may be to reach it, and he may therefore be ready to end the situation. In that case he should be allowed to go without suggestion of any blot upon his record, for if his conduct has actually been such as to warrant his dismissal, that fact has still to be proved. If he is unwilling to resign, or it is considered inexpedient to allow him to do so, I recommend that Col. Harts's supplementary memorandum be referred to him that he may present his version of the matters therein treated, and that the opinions of competent observers be secured as to his efficiency and attention to duty in his present employment. Lt. Col. Spencer Cosby, C. E., the officer under whom Mr. Burnap was originally employed here, would perhaps be the best judge of the value of his services. It is probable, too, that the members of the Fine Arts Commission are well acquainted with his capabilities.' "

"Owing to the temperamental incompatibility between you and Col. Harts the situation, I think, is such that one or the other of the two courses suggested by the Judge Advocate General ought to be followed. I am willing to accept your resignation without prejudice and will be glad to write you a letter stating that you have separated yourself from the service and that your going does not reflect upon your competency or upon the services you have rendered, but that your resignation is made because of temperamental incompatibility between you and your chief.

"Please advise me in the matter as soon as practicable."

The case having again been referred by the Secretary of War to the Judge Advocate General, the latter, under date of June 24, 1916, reported to the Secretary that—

"Under date of September 14, 1915, the officer in charge of public buildings and grounds (Col. W. W. Harts, C. E.) suspended from duty Mr. George E. Burnap, landscape architect, preferring charges, with a view to his dismissal from the service for cause, giving him ten days to answer the same. Mr. Burnap submitted his reply to the charges in detail, and the officer in charge of public buildings and grounds, under date of September 28, 1915, supplemented the charges by further specifications, which supplemental matter was referred to Mr. Burnap, and to which he submitted a supplemental reply dated June 10, 1916."

And further reported that the plaintiff had attempted to answer each of the specifications in detail; that as to many of them the papers did not afford material to warrant a definite finding without the risk of grave injustice to the employee, and added:

"But, considering the case as a whole, they exhibit Mr. Burnap in an attitude of insubordination to superior authority. Much of this attitude seems to have had its origin in the dual relation by which Mr. Burnap carried on work for private clients, dividing his time between the Government and such clients. At first this work appears to have been undertaken with the consent of his superior, but later this consent was withdrawn, after which the private work was car-

ried on against the expressed wishes and even orders of Colonel Harts, who appears to have endeavored to secure from Mr. Burnap such service as he thought Mr. Burnap should render to the Government under his employment. Upon review of the papers as a whole, I can not escape the conclusion that they exhibit Mr. Burnap in an attitude of insubordination to his superior, and that this attitude is largely due to his failure to adapt himself to the requirements of his position and loyally conform his actions to the views of his superior officer."

Calling attention to the several charges the report of the Judge Advocate General concludes:

"Mr. Burnap's reply of June 10, 1916, while denying some of these allegations and attempting to explain others, does not show a prompt compliance with the request of his superior in this regard or answer the definite allegations that he failed to do so. I think it clearly appears from the papers that Mr. Burnap did in fact evade compliance with the order of his superior with regard to private work and that the main and primary cause of ill feeling between him and his superior grew out of his failure to comply with the views of his superior in this matter. Without going into the several allegations as to difficulties in his official relations, I think there is sufficient in these papers to warrant their return to the Chief of Engineers for his action under paragraph 13, page 15, of the Regulations for the Administration of the Civil Service in the Engineer Department at Large (G. O., No. 5, Office, Chief of Engineers, June 8, 1915). Should the Chief of Engineers, after reviewing the papers, supplemented by such further inquiry into the facts as he may make, find that the discharge of Mr. Burnap is not warranted by the gravity of the offenses committed, I think it is evident that Mr. Burnap's retention in the service should be under conditions which will preclude his engaging in private work during office hours or in using Government facilities in connection with any such work which he may undertake outside of office hours. It should also be under conditions that would preclude his use of any Government employees either in or outside of office hours in connection with such private work as he may perform outside of office hours."

The plaintiff did not resign.

On June 26, 1916, the following indorsement was made on the said report of the Judge Advocate General: "To the Chief of Engineers. For action in accordance with the foregoing suggestion of the Judge Advocate General. Wm. M. Ingraham, Assistant Secretary of War."

On August 2, 1916, the Chief of Engineers made the following order:

"1. Under the provisions of paragraph 13, Section V, G. O. No. 5, O. C. E., 1915, the discharge of George E. Burnap, landscape architect, to promote the efficiency of the service, is hereby authorized.

"2. Mr. Burnap's discharge should be reported on Form 28 for the information of the Civil Service Commission.

"By command of the Chief of Engineers."

On August 3, 1916, the plaintiff was discharged in pursuance of

said order, as it appears from the third indorsement on said report, as follows:

"To the Chief of Engineers.

"1. Returned.

"2. Mr. George E. Burnap, landscape architect, has, in accordance with the authority contained in the second indorsement hereon, been this day notified by letter from this office of his discharge, to promote the efficiency of the service. His discharge will be reported on Form 28, in accordance with the instructions."

11

II.

General Orders No. 5, referred to above, from the Office of the Chief of Engineers, War Department, contained certain regulations governing the classified civil service as applied to the Engineer Department at Large which had been approved by the Civil Service Commission and the Secretary of War and were published for the information and guidance of all employing officers under the direction of the Chief of Engineers. It provides, among other things, that all points not covered by this order will be governed by the civil-service rules and regulations. Paragraph 13 of section 5, General Orders No. 5, referred to above, is as follows:

"13. Discharge for cause.—Discharge for cause of any regularly appointed classified employee will be subject to the provisions of civil-service Rule XII, and can not be made without the approval of the Chief of Engineers. An employee may be suspended without pay by the officer in charge, who should at once furnish the employee with a statement in writing of the charges against him and give him a reasonable time within which to make answer thereto in writing. As soon as reply is received, or in case no reply is received within the time given him, all papers should be submitted to the Chief of Engineers with full statement of the facts in the case and the officer's recommendations."

On August 3, 1916, the officer in charge of the Office of Public Buildings and Grounds addressed the following communication to the plaintiff:

"Sir: Referring to the charges preferred against you by the officer in charge on September 14, 1915, under which you were suspended without pay, and which have been acted upon by the department, you are, by authority of the Chief of Engineers, dated August 2, 1916, hereby discharged from the position of landscape architect under this office, in order to promote the efficiency of the service, to take effect August 3, 1916."

On July 7, 1916, the plaintiff applied to the Auditor for the War Department for the accrued salary of the position of landscape architect in the Office of Public Buildings and Grounds from September 14, 1915, to July 1, 1916, "with continued compensation at monthly intervals until such time as the Secretary of War takes action in the matter." The auditor declined to make an allowance, and his action was, upon appeal, confirmed by the comptroller on September 27, 1916.

The said position of landscape architect was in the classified civil service. A successor to the plaintiff was appointed landscape architect, at $2,400 per annum, in the Engineer Department at Large, Washington, D. C., on July 20, 1917, and duly qualified under that appointment on July 30, 1917.

III.

If the plaintiff is entitled to the salary of the position of landscape architect from the date of his suspension September 14,
12 1915, to the date of his discharge the amount would be $2,119.88; if entitled to recover to the date of the appointment of his successor the amount would be $4,306.66.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and his petition should be, and it is, dismissed. Judgment is rendered in favor of the United States against the plaintiff for the cost of printing the record in this cause in the sum of fifty-nine dollars and eighty-one cents ($59.81), to be collected by the clerk as provided by law.

Memorandum.

The court's conclusions are based upon the following considerations:

1. That plaintiff was suspended on the 14th day of September, 1915, under the provisions of paragraph 13, Section V, of General Orders No. 5, Office of Chief of Engineers, and in conformity with the instructions governing the classified civil service as applied to the Engineer Department at Large.

2. That the plaintiff's position was in the Engineer Department at Large.

13 V. *Judgment of the Court.*

33672.

GEORGE E. BURNAP

v.

THE UNITED STATES.

At a Court of Claims held in the City of Washington, on the 17th day of June, 1918, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge and decree that George E. Burnap is not entitled to recover and shall not recover any sum in this action of and from the defendants, the United States, and that the claimant's petition be and it hereby is dimissed. And it is further ordered, adjudged and decreed that the defendants, the United States,

shall have and recover of and from the claimant, George E. Burnap, the sum of fifty-nine dollars and eighty-one cents ($59.81), the cost of printing the record in said cause in this court, to be collected by the clerk as provided by law.

BY THE COURT.

14 VI. *Application for Appeal.*

In the Court of Claims.

No. 33672.

GEORGE E. BURNAP
v.
THE UNITED STATES.

From the Judgment rendered in the above-entitled cause on the 17th day of June, 1918, dismissing the petition, the claimant, George E. Burnap, hereby makes application for and gives notice of an appeal to the Supreme Court of the United States.

KING & KING,
Attorneys for Claimant.

Filed September 9, 1918.

Ordered: That the above appeal be allowed as prayed for.
October 21, 1918.

BY THE COURT.

15 In the Court of Claims.

No. 33672.

GEORGE E. BURNAP
v.
THE UNITED STATES.

I, Saml. A. Putman, Chief Clerk, Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of same; of the findings of fact and conclusion of law and memorandum; of the application for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 22" day of October, A. D. 1918.

[Seal Court of Claims.]

SAML. A. PUTMAN
Chief Clerk Court of Claims.

Endorsed on cover: File No. 26798. Court of Claims. Term No. 712. George E. Burnap, appellant, vs. The United States. Filed October 24th, 1918. File No. 26798.

Supreme Court of the United States.

GEORGE E. BURNAP
v.
THE UNITED STATES. } No. 228.

TABLE OF CONTENTS.

LIST OF CASES CITED.

SUPREME COURT OF THE UNITED STATES.

October Term, 1919.

GEORGE E. BURNAP, *Appellant*,
v.
THE UNITED STATES. } No. 228.

APPEAL FROM THE COURT OF CLAIMS.

I. STATEMENT OF THE CASE.

This is a claim for salary of the appellant as landscape architect in the office of Public Buildings and Grounds, in the War Department, at Washington, from September 14, 1915, to July 30, 1917.

The defense is that appellant was suspended from the position by the officer in charge of the Office of Public Buildings and Grounds, Colonel William W. Harts, Corps of Engineers, U. S. Army, and that he was discharged from office by the Chief of Engineers August 3, 1916.

The validity of both the suspension and discharge are contested by the appellant as not being made by the authority who appointed him, the Secretary of War. It is claimed that he could only be either suspended or removed by the same authority who appointed him, the Secretary of War.

The findings may be condensed as follows:

The office of landscape architect in the Office of Public Buildings and Grounds in the War Department exists entirely by virtue of successive legislative, executive, and judicial appropriation acts.

The first is that of June 17, 1910 (36 Stat. 504), which contains after the title "Office Public Buildings

and Grounds," among other positions and salaries, "Landscape Architect, $2,400."

The same provision with the same salary is contained in every legislative, executive and judicial appropriation act since, as follows:

1911, 36 Stat. 1207;
1912, 37 Stat. 388;
1913, 37 Stat. 766;
1914, 38 Stat. 462;
1915, 38 Stat. 1024;
1916, 39 Stat. 93;
1917, 39 Stat. 1097;
1918, 40 Stat. 786;
1919, 40 Stat. 1240.

The office thus being created under the War Department by virtue of an appropriation act, the claimant was appointed by the Secretary of War and took the oath and entered upon duty July 1, 1910.

He continued to perform the duties of the position until September 14, 1915, when he was by order of Colonel William W. Harts, U. S. A., in charge of the Office of Public Buildings and Grounds, "hereby suspended from duty and pay as landscape architect in this office to take effect from to-day, pending final action upon charges against you to be preferred to the proper authorities with a view to your dismissal from the service for cause."

The charges were answered by him and a large number of communications passed between him, the officer in charge of the Office of Public Buildings and Grounds, and several other officers of the Department.

The Secretary of War referred the matter to the Judge Advocate-General of the Army who made two reports, neither of which sustained the charges. The first was dated October 19, 1915, and the second June 24, 1916 (record, pp. 5, 6).

In the latter report the Judge Advocate-General recommended that the papers be returned to the Chief of Engineers for his action under the Regulations for the Administration of the Civil Service, but with the suggestion that if it be found that Mr. Burnap's discharge is not warranted by the gravity of the offenses committed, his retention in the service should be under certain conditions. This recommendation was referred by the Assistant Secretary to the Chief of Engineers for action in accordance with the Judge Advocate-General's suggestion.

After the appellant had made a claim to the Auditor for the War Department for the salary of his position since September 14, 1915, the Chief of Engineers authorized his discharge August 2, 1916. August 3, 1916, he was informed by the officer in charge of the Office of Public Buildings and Grounds of that action (record, foot p. 7 and top p. 8).

No successor was appointed by the Secretary of War until July 30, 1917, when a new appointment was made by the Secretary of War to the office of landscape architect.

Certain regulations governing the classified civil service as applied to the Engineer Department at Large were in force during this period.

One of them provided that an employee might be suspended without pay by the officer in charge, and that he might be discharged with the approval of the Chief of Engineers.

The court held as a conclusion of law (conclusion 2, Rec. p. 9):

"That the plaintiff's position was in the Engineer Department at Large"

and that his suspension and discharge were therefore duly and regularly carried out.

The petition was therefore dismissed and the claimant appealed to this court.

II. Assignment of Errors.

The appellant hereby assigns the following errors in the proceedings and judgment of the Court of Claims:

1. In holding that the suspension or discharge of an officer appointed by the Secretary of War could be by any other authority than the Secretary of War.
2. In holding that the appellant was an employee in the Engineer Department at Large, whereas he was an officer in the Office of Public Buildings and Grounds, a part of the office of the Chief of Engineers, in the War Department in the District of Columbia.
3. In dismissing the petition.

III. Brief of Argument.

Discharge Could Only Be by Secretary of War.

The appointment being by the Secretary of War, there could be no discharge or suspension without salary except by the same authority by whom the appellant was originally appointed.

This court in *ex parte Hennen* (13 Peters, 230) said:

"In the absence of all constitutional provision, or statutory regulation, it would seem to be a sound and necessary rule to consider the power of removal an incident to the power of appointment."

As to officers appointed by the heads of departments, the question is further reasoned out as follows (p. 260):

"The constitution has authorized Congress in certain cases to vest this power in the President alone, in the courts of law, or in the heads of departments; and all inferior officers appointed under each by authority of law must hold their office at the discretion of the ap-

pointing power. Such is the settled usage and practical construction of the constitution and laws under which these offices are held."

This case was decided in 1839. It has repeatedly been reaffirmed and its positions restated and applied. *Parsons* v. *United States*, 167 U. S. 324, 331; *Keim* v. *United States*, 177 U. S. 290, 293, 294; *Reagan* v. *United States*, 182 U. S. 419, 424.

In *United States* v. *Wickersham*, 201 U. S. 390, an officer of the Department of the Interior was held to be entitled to the compensation of his position notwithstanding an attempt by an unauthorized subordinate to suspend him.

The court said (p. 399):

"Where an officer is wrongfully suspended by one having no authority to make such an order, he ought to be, and is, entitled to the compensation provided by law during such suspension. Throop on Public Officers, Section 507; *Emmitt* v. *Mayor, etc. of New York*, 128 N. Y. 117. This was the view entertained by the Court of Claims in deciding *Lellmann's* case, 37 C. Cls. 128, on the authority of which the case at bar was decided by that court. We think the ruling was correct."

In *Shurtleff* v. *United States* (189 U. S. 311, 316), the court said:

"The right of removal would exist if the statute had not contained a word upon the subject. It does not exist by virtue of the grant, but it inheres in the right to appoint, unless limited by Constitution or statute."

In *Stilling* v. *United States* (41 C. Cls. 61), a pilot, Quartermaster Department, appointed by the Secretary of War, was held not to be subject to dismissal or furlough without pay at the discretion of some subordinate officer, but to be a case requiring the action of the Secretary of War.

The court said (p. 67):

"It is going quite far enough to say that the power having jurisdiction over him could dispense with his services at will, but this court has never recognized the right of one subordinate to order another subordinate out of the public employment either by summary dismissal or its equivalent, stated in the form of a furlough without pay, unless sanctioned by the head of the Department or other superior officer invested with power to appoint and dismiss.

"The injustice of permitting every employee to be so controlled by some other employee or official higher up in the scale of public employment is too apparent to need discussion."

In *Costello* v. *United States* (51 C. Cls. 257, 261, 262) it is said:

"It must be regarded as settled that where the authority vested by law with the power of appointment removes an employee whose term of office is not for a fixed period, and this right to remove him is not forbidden by the Constitution or statute, the court will not review the causes of the removal and will be bound by the action of the appointing power in the premises. *Keim* case, *supra; Howard* case, 22 C. Cls. 305; *Collins'* case, 48 C. Cls. 525; *Farr* case, 49 C. Cls. 699; *Murray* case, 100 U. S. 536. In such case it is a sound and necessary rule to consider the power of removal as incident to the power of appointment. *Shurtleff's* case, 189 U. S. 311, 316; *Reagan* case, 182 U. S. 419, 427; *Howard* case, 22 C. Cls. 305.

"The question, therefore, is whether the superintendent of the mint at Philadelphia had the power to remove the plaintiff, and the answer to the question depends upon whether the superintendent was vested with the authority of appointment of plaintiff."

In *United States* v. *Lapp* (244 Fed. 377, 382) the court said:

"In the absence of constitutional or statutory regulations, the power of appointment carries with it as an incident the power to remove when no definite term is attached to the office by law. *Re Hennen*, 13 Pet. 230, 259, 10 L. Ed. 136; *Parsons* v. *United States*, 167 U. S. 324, 331, 17 Sup. Ct. 880, 42 L. Ed. 185; *Morgan* v. *Nunn* (C. C.), 84 Fed. 551, 552; *People* v. *Robb*, 126 N. Y. 180, 182, 27 N. E. 267; *People* v. *Fire Com'rs*, 73 N. Y. 437. When an appointee holds at the will and discretion of his superior, he is subject to removal at pleasure, the power of removal residing in the person in whom is vested the power of appointment. *Re Hennen*, 13 Pet. at p. 259; *Keim* v. *United States*, 177 U. S. 293, 294, 20 Sup. Ct. 574, 44 L. Ed. 774; *Robertson* v. *Coughlin*, 196 Mass. 539, 542, 82 N. E. 678, 13 Ann. Cas. 804."

The appellant was appointed by the Secretary of War, the head of a department, an officer by whom an "inferior officer" of the United States may constitutionally be appointed. He could not be removed from office, either temporarily or permanently, by the Chief of Engineers of the Army; and much less by the officer in charge of the Office of Public Buildings and Grounds.

The appellant was not suspended from duty or removed from office by authority of the Secretary of War. A letter personally written and signed by the Secretary of War on April 12, 1916, more than six months after the appellant's suspension from office, distinctly recognizes him as still holding the office. He suggests the alternative of an honorable resignation or a possible further hearing, coupled with obtaining an opinion of competent observers as to his efficiency and concludes (Rec. p. 6):

"I am willing to accept your resignation without prejudice, and will be glad to write you a letter stating that you have separated yourself from the service, and

that your going does not reflect upon your competency or upon the services you have rendered, but that your resignation is made because of temperamental incompatibility between you and your chief."

This clearly recognizes that the appellant was still remaining in the service of the United States at that date.

Regulations as to "Employees" and "Engineer Department at Large."

The power to suspend without salary on the part of the officer in charge of the Office of Public Buildings and Grounds and of the Chief of Engineers to discharge from the service was claimed under a regulation for the Engineer Department at Large, providing that "any regularly appointed classified employee" may be suspended by the officer in charge or discharged by the Chief of Engineers.

This regulation is contained in a volume entitled "Instructions governing the Classified Civil Service as Applied to the Engineer Department at Large." These regulations have no application to the Office of the Chief of Engineers in Washington or any of its branches. An examination of the General Order as a whole will show that it relates entirely to local work outside of Washington.

The Oxford Dictionary defines the term "at large" as meaning "over a large surface or area; abroad." As applied to the War Department it is used in this same sense "abroad," or outside of the District of Columbia.

The army appropriation act for the fiscal year ending June 30, 1918, approved May 12, 1917 (40 Stat. 40) as does that of the preceding year (39 Stat. 620), opens with an appropriation in this form:

"CONTINGENCIES OF THE ARMY:—For all contingencies of the Army not otherwise provided for and embracing all branches of the military service, including the office of the Chief of Staff; for all emergencies and extraordinary expenses, including the employment of translators and exclusive of all other personal services in the War Department, or any of its subordinate bureaus or offices at Washington, District of Columbia, or in the Army *at large*, but impossible to be anticipated or classified; to be expended on the approval and authority of the Secretary of War, and for such purposes as he may deem proper, including the payment of a per diem allowance not to exceed $4, in lieu of subsistence, to employees of the War Department traveling on official business outside of the District of Columbia and away from their designated posts, $50,000."

Here, "the War Department, or any of its subordinate bureaus or offices at Washington, District of Columbia," is used in contradistinction to "the Army at Large."

Moreover, an examination of the Official Registers covering the very period in question shows that this appellant was not officially regarded as being in the Engineer Department at Large. The Official Register for 1911 (Vol. 1, pp. 51, 52) shows, under the general head of War Department:

"Office of the Chief of Engineers.

* * * * * * *

Office Public Buildings and Grounds, Washington, D. C.

* * * * * * *

George E. Burnap, Landscape architect, $2,400."

* * * * * * *

"Engineer Department at Large.
Northeastern Division."

After this follow the various divisions and local offices of the Engineer Corps throughout the country. To the

same effect, Official Registers for 1913 (pp. 60, 61); 1915 (pp. 60, 61).

This shows that the appellant was not one of the employees of the Engineer Department at Large. He could not therefore be suspended by authority of the officer in charge.

The appointment of the appellant (Finding I, Rec. p. 4) makes no reference to the service "at large." It simply appoints him generally. In contrast is the appointment of his successor (Rec. top p. 9), which purports to appoint the new officer "in the Engineer Department at Large, Washington, D. C." Clearly this was a classification made after this suit was in course of prosecution and perhaps in consequence of it.

Office of Public Buildings and Grounds.

The fact that the office of Public Buildings and Grounds is a part of the Office of the Chief of Engineers, a bureau of the War Department, at Washington, clearly appears from the statutes on the subject.

By Revised Statutes, Sec. 1797, as amended by the act of April 28, 1902 (32 Stat. 152; Compiled Stat. Sec. 3308) it is provided:

"The Chief of Engineers shall have charge of the public buildings and grounds in the District of Columbia, under such regulations as may be prescribed by the President, through the War Department, except those buildings and grounds which are otherwise provided for by law;" etc.

By Revised Statutes, Sec. 1812, Comp. Stat. Sec. 3327,

"The Chief of Engineers shall as superintendent of public buildings and grounds," annually submit certain reports.

These sections clearly show that the care of the public buildings and grounds at the seat of government is

simply one of the duties imposed by statute upon the Chief of Engineers of the Army as head of one of the bureaus of the War Department.

In *United States* v. *Ashfield*, 91 U. S. 317, it was held that one of the watchmen or park police appointed to guard the parks under the Chief of Engineers as Superintendent of Public Buildings and Grounds is (p. 319) "a watchman employed in one of the executive departments of the government."

Thus appellant in this case was not in the Engineer Department "at large," but in one of the regular bureaus of the War Department at Washington.

Appellant not an "Employee."

But there is still another reason why appellant was not subject to the regulation set out in Finding II (record, p. 8). He was not "an employee" at all as referred to in that regulation. He was an officer.

The regulation relied upon as authority for his suspension and removal by an officer inferior to the Secretary of War, par. 13 (Rec. middle p. 8), refers to "any regularly appointed classified employee," not to a statutory officer appointed by the head of a department.

The office held by the appellant was created by statute. It was a professional position. The holder of it was an officer of the department, and was not in law or by the customary use of language designated or known as an "employee."

In *People* v. *Board of Police*, 75 N. Y. 38, 41, it was held:

"A police surgeon is not a clerk or employee within New York Charter, 1873, c. 755, Sec. 2, giving the police board power to fix the salaries and compensation of all

clerks appointed by the board, and of all employees whom they may be authorized to appoint; he is an officer within the meaning of the charter. Certainly such surgeons are not clerks, and, as employees are usually considered as embracing laborers and servants, and those occupying inferior positions, they can scarcely be included in that class of persons."

In *People* v. *City of Buffalo*, 11 N. Y. Supp. 314, 315, the court approved the definition of the Century Dictionary of the word "employee," as "one who works for an employer; a person working for a salary or wages; applied to any one working, but usually only to clerks, workmen, laborers, etc., and but rarely to the higher officers of a corporation or government, or to domestic servants." As used in Laws, 1890, c. 388, requiring municipal corporations to pay weekly every employee engaged in its business, it does not include a clerk in the mayor's office, the secretary and treasurer of the park commission, a member of the fire department, a school teacher, or a patrolman on the police force.

In *People* v. *Remington*, 45 Hun, 329, elaborate consideration was given to the question who are included within the term "employees."

In *Palmer* v. *Van Santvoord*, 38 L. R. A. 402, 404, the decision was thus accurately summarized:

"In *People* v. *Remington* the claims of the superintendent, of the attorney, and of an agent for the general management of the foreign business of the corporation in China, to a preference under the act of 1885, were disallowed on the ground that they were not employees within the common acceptance and meaning of the word."

The judgment in the *Remington* case was affirmed by the Court of Appeals on the opinion below (109 N. Y. 631).

So, too, it has been held that a health officer is not included in the term "employee." *State* v. *Craig*, 69 Ohio St. 236.

In *United States* v. *Schlierholz*, 137 Fed. 616, the court said (p. 624):

"In the common acceptation, the meaning of the words 'appointment' and 'employment' is quite different. An officer is usually appointed, while a person employed is spoken of as an 'employee,' and but rarely, if ever, as an 'officer.'"

It is also stated (p. 624):

"In *Palmer* v. *Van Santvoord*, 153 N. Y. 612, 47 N. E. 915, 38 L. R. A. 402, the court held:—

"'An employee is one who works for an employer; a person working for a salary or wage. The word is applied to any one so working, but usually only to clerks, workmen, laborers, etc., and but rarely to officers of a government or corporation.'"

CONCLUSION.

Thus the regulation can not apply to this case for three reasons:—

1. It was not constitutionally competent for the Secretary of War, even had he desired to do so, to make a regulation which should annul the constitutional rule that an officer appointed by the head of a department can be removed only by the same power which appoints him.

2. The claimant was not in the Engineer Department at large, but in the War Department at Washington, D. C.

3. The claimant was not an "employee" to whom alone the regulation applies, but an officer of the United States. Hence the regulation has no application to his case.

Thus the attempted removal of the claimant from office by the Chief of Engineers was unauthorized and void. Much more so was the attempted suspension without pay, or temporary removal, by the officer in charge of the Office of Public Buildings and Grounds.

The judgment of the Court of Claims should be reversed and the cause remanded with direction to enter judgment for the appellant for the amount claimed.

GEORGE A. KING,
WILLIAM B. KING,
WILLIAM E. HARVEY,
Attorneys for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

GEORGE E. BURNAP, APPELLANT,
v.
THE UNITED STATES. } No. 228.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

By act of June 17, 1910 (36 Stat., 504), under the title of "Office of Public Buildings and Grounds," there was created a position, among others, of landscape architect at a salary of $2,400 per year. On May 3, 1910, appellant was appointed landscape architect "in the Office of Public Buildings and Grounds," and he took the oath of office July 1, 1910. Appellant's appointment was made by the Secretary of War upon certification from the Civil Service Commission.

During the year 1913 and continuously thereafter considerable friction arose between appellant and his immediate superior officer, the officer in charge of Public Buildings and Grounds, because of alleged inefficiency, disobedience of orders, evasion, and lack of adaptability. This friction finally culminated, on

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September 14, 1915, in charges being preferred against appellant by his superior officer. Appellant was given an opportunity to answer the charges, which he did under oath, and all the papers were then referred to the Chief of Engineers.

Paragraph V of General Orders, No. 5, approved by the Civil Service Commission and the Secretary of War June 8, 1915, contains certain regulations governing the classified civil service as applied to the Engineer's Office. These regulations were published for the information and guidance of all employing officers under direction of the Chief of Engineers.

Section 13 of Paragraph V of General Orders, No. 5, above referred to, follows (Finding II, R. 8):

> 13. *Discharge for cause.*—Discharge for cause of any regularly appointed classified employee will be subject to the provisions of civil-service Rule XII, and can not be made without the approval of the Chief of Engineers. An employee may be suspended without pay by the officer in charge, who should at once furnish the employee with a statement in writing of the charges against him and give him a reasonable time within which to make answer thereto in writing. As soon as reply is received, or in case no reply is received within the time given him, all papers should be submitted to the Chief of Engineers with full statement of the facts in the case and the officer's recommendations. (Finding of Fact II, Rec., p. 8.)

The charges against appellant were not acted upon by the Chief of Engineers, because the Secretary of War, at appellant's request (Finding I, R. 4) directed that the papers be submitted to him for consideration. The Secretary of War referred the case to the Judge Advocate General, which officer, under date of October 19, 1915, prepared a memorandum for the Secretary of War. The conclusion reached by the Judge Advocate General was that appellant should be allowed to resign, if he were willing to do so, and if not that he be given a copy of the supplementary memorandum of charges filed by the officer in charge of Public Buildings and Grounds that he might present his version of the matters therein embraced (R. 5). The case was held under consideration by the Secretary of War until April 12, 1916, on which date the latter officer wrote appellant that he thought that "one or the other of the two courses suggested by the Judge Advocate General ought to be followed," and that he was willing to accept appellant's resignation without prejudice (R. 5, 6).

But appellant did not resign (R. 6, 7). On June 10, 1916, he submitted his reply to the supplemental charges. Thereupon the matter was again referred to the Judge Advocate General, and under date of June 24, 1916, that officer prepared a second memorandum for the Secretary of War, in which he stated, among other things, that (Finding I, R. 7)—

> I think it clearly appears from the papers that Mr. Burnap did in fact evade compliance with the order of his superior with regard to

> private work and that the main and primary cause of the ill feeling between him and his superior grew out of his failure to comply with the views of his superior in this matter. Without going into the several allegations as to difficulties in his official relations, I think there is sufficient in these papers to warrant their return to the Chief of Engineers for his action under paragraph 13, page 15, of the Regulations for the Administration of the Civil Service in the Engineer Department at Large (G. O., No. 5, Office Chief of Engineers, June 8, 1915).

The case was thereupon further considered by the Secretary of War and by the Assistant Secretary of War. On June 26, 1916, all the papers were returned to the Chief of Engineers by the Assistant Secretary of War, with the following indorsement:

> For action in accordance with the foregoing suggestion of the Judge Advocate General. (Rec. p. 7.)

Thereafter and on August 2, 1916, after careful consideration by the Chief of Engineers that officer ordered that appellant be discharged to promote the efficiency of the service under the provisions of paragraph 13 above referred to. Appellant was accordingly notified by the officer in charge of Public Buildings and Grounds of his dismissal from the service.

The court below held, first, that appellant was suspended under the provisions of section 13 above referred to governing the classified service as applied to the Engineer Department at Large, and, second,

that appellant's position was in the Engineer's Department at Large.

Appellee contends—

First, that both the suspension and discharge of appellant were in law the acts of the Secretary of War.

Second, that even assuming that the removal was by a subordinate official, it was in pursuance of authority legally delegated by the Secretary of War.

ARGUMENT.

FIRST POINT.

Appellant was removed from office by the Secretary of War.

Admitting the well-settled rule that the power of removal from office is an incident to the power of appointment, the facts here show that in legal contemplation appellant was removed from office by the appointing authority.

Appellant was first suspended from duty and pay by his immediate superior, the officer in charge "of the office of Public Buildings and Grounds" (R. 4). That suspension was authorized by section 13, paragraph V, General Orders, 1915, or of section 3, Civil Service Rule XII. Very shortly after the suspension was made the matter was considered by two Secretaries of War, one Assistant Secretary of War, twice by the Judge Advocate General, and many times by the Chief of Engineers, without any question being raised as to the power to suspend, or of the power having been exercised in the proper manner by the proper officer.

At *appellant's request* the case was referred to the Secretary of War. The Secretary of War referred it

to the Judge Advocate General. Appellant was suspended September 14, 1915. On October 19, 1915, the Judge Advocate General had prepared his memorandum for the "personal consideration" of the Secretary of War. The Secretary of War thereupon held the case under consideration until April 12, 1916. On that day and acting in accord with the suggestion of the Judge Advocate General, he wrote appellant offering to accept his resignation, but appellant did not resign. On June 10, 1916, he submitted a further answer in detail. The Secretary of War thereupon again referred the papers to the Judge Advocate General. On June 24, 1916, the Judge Advocate General made another memorandum for the Secretary of War, concluding that in his opinion there was "sufficient in these papers to warrant their return to the Chief of Engineers for his action under paragraph 13," etc. This memorandum of the Judge Advocate General was sent to the Chief of Engineers by the Assistant Secretary of War "for action in accordance with the foregoing suggestion of the Judge Advocate General."

Thus it appears that for almost one year the case of appellant was active in the personal office of the Secretary of War, and that finally, by his direction, through the Assistant Secretary of War, it was referred to the Chief of Engineers for action under a paragraph of the General Orders of 1915 which provide solely and alone for dismissals from the service. In other words, a reference by the Secretary of War to the Chief of Engineers for action under that sec-

tion was tantamount to a direction by the Secretary of War to dismiss appellant from the service, and this the Chief of Engineers did.

Therefore, it appears that as matter of law and fact appellant was dismissed from the service by the Secretary of War.

SECOND POINT.

If Appellant was not dismissed by the Secretary of War his dismissal was under authority legally delegated to the Chief of Engineers.

Assuming, for argument, that in law the act of the Chief of Engineers in dismissing appellant from the service was not the act of the Secretary of War himself, it nevertheless is plain that in so far as relates to the Engineer Department the Secretary of War had delegated the authority of suspension and dismissal from the service to the Chief of Engineers and his subordinates. This plainly appears from a reading of section 13, paragraph V, of General Orders, No. 5 (1915), heretofore set out. Appellant, however, says that paragraph 13 "applies to the Engineer Department at Large," and that he was not in the Engineer Department at Large.

It is true that the caption to General Orders, No. 5 (Finding II, R. 8), states that the "following regulations governing the classified service as applied to the 'Engineer Department at Large' have been approved by the Civil Service Commission and the Secretary of War," but the very next phrase plainly shows that the regulations "are published for the information and guidance of all *employing officers*

under the direction of the Chief of Engineers." The office of Public Buildings and Grounds is under the Chief of Engineers, and the officer in charge of that office is an employing officer under the direction of the Chief of Engineers.

By the act of July 16, 1790 (1 Stats., p. 130), Congress authorized the President to appoint three commissioners to lay out a district or territory for the permanent seat of the Government of the United States, and directed the commissioners to provide suitable buildings for the Congress, for the President, and for the public offices of the Government. The district laid out under this authority was called by the commissioners the Territory of Columbia and the Federal city the city of Washington. (Letter of commissioners to L'Enfant, Sept. 9, 1791.)

By the act of May 1, 1802 (2 Stats., p. 175), the offices of the commissioners were abolished and their duties devolved upon a superintendent, to be appointed by the President of the United States.

Section 5 of the act of April 29, 1816 (3 Stats., p. 324), abolished the office of superintendent and devolved his duties upon a commissioner of public buildings.

Section 2 of the act of March 2, 1867 (14 Stats., p. 466), abolished the office of commissioner of public buildings and devolved his duties upon the Chief of Engineers, as follows:

> That the office of commissioner of public buildings is hereby abolished, and the Chief Engineer of the Army shall perform all the duties now required by law of said commis-

sioner, and shall also have the superintendence of the Washington Aqueduct and all the public works and improvements of the Government of the United States in the District of Columbia, unless otherwise provided by law.

The transfer of duties provided by this legislation was made under orders of the Chief of Engineers contained in letter dated March 13, 1867.

Thus it appears that by direct provision of law the office of public buildings and grounds is placed under the supervision of the Chief of Engineers.

Even assuming for argument that the regulations here involved apply only to the "Engineer Department at Large," the case is not altered. As matter of fact the office of public buildings and grounds is a part of the Engineer Department at Large. The Court of Claims in its memorandum states "that plaintiff's position was in the Engineer Department at Large." (R. 9.) While this is classed by the court as a conclusion, there are no facts found which would warrant any other conclusion. Claimant's argument under this head would tend to establish the proposition that the Chief of Engineers could suspend an employee of his department in Alaska, but not one under his personal observation in Washington.

The Engineer Department of the Army consists of two parts: First, the office of the Chief of Engineers; and, second, the Engineer Department at Large. The office of Chief of Engineers is simply a

supervisory office controlling and directing all of the matters which are handled by the Engineer Department at Large, whether within the District of Columbia or throughout the country generally. The Engineer Department at Large consists of the local officers and offices maintained within the District of Columbia and throughout the country to carry out the provisions of legislation relating to river and harbor improvements, public works, and fortifications, under the direction of the Chief of Engineers. This being the composition of the Engineer Department, it is at once apparent that since by legislation the office of public buildings and grounds is placed under the supervision of the Chief of Engineers, it necessarily must be either part of the office of the Chief of Engineers or the Engineer Department at Large. That it is not a part of the office of the Chief of Engineers is plainly shown by the appropriation acts. The very statute creating the office of landscape architect (36 Stats., p. 504) appropriates (p. 503) for the "office of the Chief of Engineers." In that section it appears that appropriation is made simply for the personal office force of the Chief of Engineers, whereas the appropriation for landscape architect appears on the next page (504) under an entirely separate heading—that of public buildings and grounds—and the landscape architect is provided for along with all other clerks, stenographers, messengers, and other employees of the office of public buildings and grounds in the same manner as are appropriations made for other projects under the Engi-

neer Department (see 36 Stats., p. 725), such as Yellowstone and other national parks, etc. Necessarily appropriations for other works carried on in the Engineer Department at Large, such as river and harbor improvements and fortifications, are carried in the appropriations annually made for those specific purposes in the same manner as the special appropriations made for the office of public buildings and grounds. Indeed, within the District of Columbia there is a district engineer's office in charge of the aqueduct, Potomac River improvements, filtration plant, etc. (all of which were placed under the superintendence of the Chief of Engineers by the same act of 1867 which placed him in charge of public buildings and grounds), and it could with as much logic be said that this District of Columbia office was a part of the office of the Chief of Engineers as contradistinguished from the Engineer Department at Large as it can be said that the office of public buildings and grounds is not a part of the Engineer Department at Large.

An examination of the annual report of the Chief of Engineers likewise compels the conclusion that the office of Public Buildings and Grounds is a part of the Engineer Department at Large. The report of 1917, similar in form to the reports of previous years, shows on page 3 thereof the disposition of engineer officers according to their duties as follows: "Chief of Engineers, in command of the Engineer Department, etc., 1; assistants to the Chief of Engineers, or on special duty in his office, 11." Then follow six assignments to river and harbor and forti-

fication work, and next come Public Buildings and Grounds, District of Columbia, followed by other assignments to the various works of public improvement under the direction of the Chief of Engineers, but in the Engineer Department at Large, thereby illustrating that there is no distinction whatever between the office of Public Buildings and Grounds and the other many and varied offices in the Engineer Department at Large, but nevertheless under the direction of the Chief of Engineers.

A further illustration of the fact that the office of Public Buildings and Grounds is a part of the Engineer Department at Large is a comparison of the work carried on by the office of Public Buildings and Grounds with other District offices in the Engineer Department at Large. From page 1903 of the report of the Chief of Engineers it appears that the office of Public Buildings and Grounds has charge of all the United States wharf property in Washington, the monument at Wakefield, Va., the Arlington Memorial Bridge Commission, the Highway Bridge across the Potomac River, bathing beaches of the Tidal Basin, etc. The appropriations for all of this work are carried in the legislative, executive, and judicial acts, the sundry civil act and the District of Columbia, unlike the provisions for the office of the Chief of Engineers, which occur alone in the legislative bill, but similar in all respects to the provision for all the offices in the Engineer Department at Large. It is also to be seen from the annual report that the information and statistics relating to the

office of Public Buildings and Grounds is not set out as a part of the office of the Chief of Engineers, but is to be found sandwiched in between two offices which are undoubtedly in the Engineer Department at Large, such as supervision of the harbor of New York, and the survey of northern and northwestern lakes. Therefore, it would seem too clear for argument that any regulations relating to the Engineer Department at Large would necessarily include the office of Public Buildings and Grounds. If any more than what has been said is needed to sustain such a proposition, it certainly would appear when it is considered that the Secretary of War and the Chief of Engineers, the two persons most competent to speak upon the subject, undoubtedly thought in the procedure taken in appellant's case that the regulation involved applied to an employee in the office of Public Buildings and Grounds. The Chief of Engineers proceeded under that section and the Secretary of War specifically referred the matter to him for final action under paragraph 13.

Plaintiff also says that the regulation applied only to employees, and that he was an officer. The regulations state that they govern "the classified civil service." That plaintiff was in the classified civil service is found. (Finding II, R. 9.) He was appointed after a special examination held by the Civil Service Commission to fill the vacancy. By his petition he bases his right to recover upon an "Act of August 24, 1913, providing for written charges * * * in the case of all persons in the

classified civil service of the United States." The mere fact that appellant's position was created by statute does not make him an officer. Indeed, the very section of the act creating the position of landscape architect provides for assistant and chief clerks, a clerk of class 3, clerk and stenographer, and messengers. Surely it can not be said that if it was desirable to remove a person holding some of the statutory positions created in the same section with appellant it would be impossible to do so under section 13.

CONCLUSION.

The judgment of the Court of Claims should be affirmed.

Respectfully submitted.

FRANK DAVIS, JR.,
Assistant Attorney General.

HARVEY D. JACOB,
Attorney.

O

BURNAP *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 228. Argued March 12, 1920.—Decided April 19, 1920.

The power to remove from public office or employment is, in the absence of any statutory provision to the contrary, an incident of the power to appoint, and the power to suspend is an incident of the power of removal. P. 515.

In § 169, Rev. Stats., which authorizes each "head of a Department"

to employ clerks, messengers, laborers, etc., and other employees, "head of a Department" means the Secretary in charge of a great division of the executive branch, who is a member of the Cabinet, and does not include heads of bureaus or lesser divisions. P. 515.

The term "employ" as thus used is the equivalent of appoint. *Id.*

The terms "clerks" and "other employees," as used in Rev. Stats., § 169, include persons filling positions which require technical skill, learning and professional training. *Id.*

Whether the incumbent is an officer or an employee is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto. P. 516.

Although the Office of Public Buildings and Grounds is part of the bureau of the Chief of Engineers, in the War Department, appointment of a landscape architect (whose employment is authorized by general appropriation acts) is not to be made by the Secretary of War under the general authority of Rev. Stats., § 169, but by the Chief of Engineers, under the specific authority given him by § 1799, to employ in such office and in and about the public buildings and grounds under his control such persons as may be appropriated for from year to year. *Id.*

The power to remove such landscape architect is with the Chief of Engineers as an incident of the power of appointment, and is not affected by the fact that the appointment, acquiesced in by the Chief of Engineers, was made without authority by the Secretary. P. 518.

In the absence of regulations prescribed by the President through the War Department under Rev. Stats., § 1797, and assuming the regulations governing the classified Civil Service as applied to the Engineer Department at large do not affect the Office of Public Buildings and Grounds, the power of the Chief of Engineers to remove the landscape architect is to be exercised in the manner prescribed by the Act of August 24, 1912, c. 389, § 6, 37 Stat. 555, and Civil Service Rule XII. P. 519.

The landscape architect in the Office of Public Buildings and Grounds is not an officer but an employee. *Id.*

53 Ct. Clms. 605, affirmed.

THE case is stated in the opinion.

Mr. George A. King, with whom *Mr. William B. King* and *Mr. William E. Harvey* were on the brief, for appellant.

Mr. Assistant Attorney General Davis, with whom *Mr. Harvey D. Jacob* was on the brief, for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

On July 1, 1910, Burnap entered upon duty in the Office of Public Buildings and Grounds as landscape architect at the salary of $2400 a year, having been appointed to that position by the Secretary of War. On September 14, 1915, he was suspended, upon charges, from duty and pay; and on August 3, 1916, he was discharged "in order to promote the efficiency of the service." His successor was not appointed until July 20, 1917. Burnap contends that his suspension and discharge were illegal and hence inoperative; that he retained his position until his successor was appointed; and that until such appointment he was entitled to his full salary. *United States* v. *Wickersham*, 201 U. S. 390. His claim for such salary was rejected by the Auditor of the War Department (of which the Office of Public Buildings and Grounds is a part), and, upon appeal, also by the Comptroller of the Treasury. Then this suit was brought in the Court of Claims. There his petition was dismissed and the case comes here on appeal.

Burnap rests his claim mainly upon the fact that he was appointed by the Secretary of War, contending that, therefore, only the Secretary of War could remove him (21 Ops. Atty. Gen. 355), and that no action tantamount to a removal by the Secretary was taken until his successor was appointed. Before discussing the nature and effect of the action taken, it is necessary to consider the general rules of law governing appointment and removal in the civil service of the United States, the statutes relating to the Office of Public Buildings and Grounds, and those providing for the appointment of a landscape architect therein.

First. The Constitution (Art. II, § 2) confers upon the

President the power to nominate, and with the advice and consent of the Senate to appoint, certain officers named and all other officers established by law whose appointments are not otherwise therein provided for; but it authorizes Congress to vest the appointment of inferior officers either in the President alone, in the courts of law or in the heads of departments (6 Ops. Atty. Gen. 1). The power to remove is, in the absence of statutory provision to the contrary, an incident of the power to appoint. *Ex parte Hennen*, 13 Pet. 230, 259, 260; *Blake* v. *United States*, 103 U. S. 227, 231; *United States* v. *Allred*, 155 U. S. 591, 594; *Keim* v. *United States*, 177 U. S. 290, 293, 294; *Reagan* v. *United States*, 182 U. S. 419, 426; *Shurtleff* v. *United States*, 189 U. S. 311, 316. And the power of suspension is an incident of the power of removal.

Section 169 of the Revised Statutes provides that:

"Each head of a Department is authorized to employ in his Department such number of clerks of the several classes recognized by law, and such messengers, assistant messengers, copyists, watchmen, laborers, and other employés, and at such rates of compensation, respectively, as may be appropriated for by Congress from year to year."

The term head of a Department means, in this connection, the Secretary in charge of a great division of the executive branch of the Government, like the State, Treasury, and War, who is a member of the Cabinet. It does not include heads of bureaus or lesser divisions. *United States* v. *Germaine*, 99 U. S. 508, 510. Persons employed in a bureau or division of a department are as much employees in the department within the meaning of § 169 of the Revised Statutes as clerks or messengers rendering service under the immediate supervision of the Secretary. *Manning's Case*, 13 Wall. 578, 580; *United States* v. *Ashfield*, 91 U. S. 317, 319. The term employ is used as the equivalent of appoint. 21 Ops. Atty. Gen. 355, 356. The term clerks and other employees, as there

used, is sufficiently broad to include persons filling positions which require technical skill, learning and professional training. 29 Ops. Atty. Gen. 116, 123; 21 Ops. Atty. Gen. 363, 364; 20 Ops. Atty. Gen. 728. The distinction between officer and employee in this connection does not rest upon differences in the qualifications necessary to fill the positions or in the character of the service to be performed. Whether the incumbent is an officer or an employee is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto. 15 Ops. Atty. Gen. 3; 17 Ops. Atty. Gen. 532; 26 Ops. Atty. Gen. 627; 29 Ops. Atty. Gen. 116; *United States* v. *Hartwell*, 6 Wall. 385; *United States* v. *Moore*, 95 U. S. 760, 762; *United States* v. *Perkins*, 116 U. S. 483; *United States* v. *Mouat*, 124 U. S. 303; *United States* v. *Hendee*, 124 U. S. 309; *United States* v. *Smith*, 124 U. S. 525; *Auffmordt* v. *Hedden*, 137 U. S. 310; *United States* v. *Schlierholz*, 137 Fed. Rep. 616; *Martin* v. *United States*, 168 Fed. Rep. 198.

Second. The powers and duties of the Office of Public Buildings and Grounds had their origin in the Act of July 16, 1790, c. 28, 1 Stat. 130, which authorized the President to appoint three Commissioners to lay out a district for the permanent seat of the Government. By Act of May 1, 1802, c. 41, 2 Stat. 175, the offices of Commissioners were abolished and their duties devolved upon a Superintendent, to be appointed by the President. By Act of April 29, 1816, c. 150, 3 Stat. 324, the office of Superintendent was abolished and his duties devolved upon a Commissioner of Public Buildings. By Act of March 2, 1867, c. 167, § 2, 14 Stat. 466, the office of Commissioner was abolished and his duties devolved upon the Chief of Engineers. By § 1797 of the Revised Statutes as amended by Act of April 28, 1902, c. 594, 32 Stat. 152, it is declared that the Chief of Engineers has "charge of the public buildings and grounds in the District of Columbia, under such regula-

tions as may be prescribed by the President, through the War Department." And § 1812 requires the Chief of Engineers, as Superintendent of Public Buildings and Grounds, to submit annual reports to the Secretary of War to accompany the annual message of the President to Congress.

Third. There is no statute which creates an office of landscape architect in the Office of Public Buildings and Grounds nor any which defines the duties of the position. The only authority for the appointment or employment of a landscape architect in that office is the legislative, executive, and judicial appropriation Act of June 17, 1910, c. 297, 36 Stat. 504 (and later appropriation acts in the same form, 36 Stat. 1207; 37 Stat. 388, 766; 38 Stat. 482, 1024; 39 Stat. 93), which reads as follows:

"PUBLIC BUILDINGS AND GROUNDS.

"Office of Public Buildings and Grounds: Assistant Engineer, two thousand four hundred dollars; assistant and chief clerk, two thousand four hundred dollars; clerk of class four; clerk of class three; clerk and stenographer, one thousand four hundred dollars; messenger; landscape architect, two thousand four hundred dollars; surveyor and draftsman, one thousand five hundred dollars; in all, fourteen thousand three hundred and forty dollars." (Then follow the foremen and night and day watchmen in the parks.)

Prior to July 1, 1910, similar appropriation acts had provided for a "landscape gardener" at the same salary. There is no statute which provides specifically by whom the landscape architect in the Office of Public Buildings and Grounds shall be appointed. As the Office of Public Buildings and Grounds is a part of the bureau of the Chief of Engineers, and that bureau is in the War Department, the Secretary of War would, under § 169, have the power to appoint the landscape architect as an employee in his department, in the absence of other provision dealing with

the subject. 21 Ops. Atty. Gen. 355. But § 1799 of the Revised Statutes provides that:

"The Chief of Engineers in charge of public buildings and grounds is authorized to employ in his office and about the public buildings and grounds under his control such number of persons for such employments, and at such rates of compensation, as may be appropriated for by Congress from year to year."

This more specific provision excludes positions in the office of Public Buildings and Grounds from the operation of the general provision of § 169 conferring the power of appointment upon the heads of departments. Compare 10 Dec. of Comptroller of Treas. 577, 583. The appointment of Burnap by the Secretary of War, instead of by the Chief of Engineers, was without authority in law.

Fourth. As the power to remove is an incident of the power to appoint, the Chief of Engineers would clearly have had power to remove Burnap, if the appointment had been made by him instead of by the Secretary of War. The fact that Burnap was, by inadvertence, appointed by the Secretary, does not preclude the Chief of Engineers from exercising in respect to him the general power to remove employees in his office conferred, by implication, in § 1799 of the Revised Statutes. The defect in Burnap's original appointment was cured by the acquiescence of the Chief of Engineers throughout five years, so that Burnap's status was better than that of a mere *de facto* officer. But it was not superior to what it would have been if he had been regularly appointed by the Chief of Engineers. *United States* v. *Mouat*, 124 U. S. 303.

Fifth. The question remains, whether there was a legal exercise by the Chief of Engineers of his power of removal. The suspension of Burnap was by letter from his immediate superior, the officer in charge of the Office of Public Buildings and Grounds under the Chief of Engineers; and to the latter the papers were promptly transmitted. The

discharge was by direct command of the Chief of Engineers. Both the suspension and the discharge purported to be ordered pursuant to Paragraph 13 of § 5 of General Orders Number 5 of the Office of Chief of Engineers, 1915, being regulations governing the classified Civil Service as applied to the Engineer Department at Large, approved by the Civil Service Commission and the Secretary of War.[1] Burnap contends that the provisions of that paragraph were inapplicable to his position; (1) because these regulations relate to the Engineer Department at Large and the Office of Public Buildings and Grounds is not included therein; and (2) because they relate to employees and that the landscape architect was an officer, not an employee. As has been shown Burnap was an employee. But the main contention is wholly immaterial. If Paragraph 13 does not apply to the position of landscape architect, the exercise of the right of removal which rested in the Chief of Engineers was governed only by the provisions of the Act of August 24, 1912, c. 389, § 6, 37 Stat. 555,[2] and Civil Service Rule XII. For no regulations

[1] Par. 13: "Discharge for Cause.—Discharge for cause of any regularly appointed classified employee will be subject to the provisions of Civil Service Rule XII and cannot be made without the approval of the Chief of Engineers. An employee may be suspended without pay by the officer in charge, who should at once furnish the employee with a statement in writing of the charges against him and give him a reasonable time within which to make answer thereto in writing. As soon as reply is received, or in case no reply is received within the time given him, all papers should be submitted to the Chief of Engineers with full statement of the facts in the case and the officer's recommendations."

[2] C. 389, § 6: "No person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; etc."

relating to the matter appear to have been "prescribed by the President, through the War Department" under the authority reserved in Revised Statutes, § 1797, as amended. It is not contended that the procedure adopted in suspending and removing Burnap disregarded any requirement of the Act of 1912 or of the Civil Service Rule. Nor are we asked to review the discharge as having been made without adequate cause. The power of removal was legally exercised by the Chief of Engineers; and no irregularity has been pointed out in the suspension which was incident to it.

Sixth. As the power of discharge was vested in the Chief of Engineers and was unaffected by the fact that the appointment had been inadvertently made by the Secretary of War, we have no occasion to consider the contention of Burnap, that it was beyond the Secretary's power to delegate to the Chief of Engineers authority to remove employees in his bureau. Nor need we consider the contention of the Government, that the action taken was tantamount to a removal by the Secretary, because the discharge was ordered by the Chief of Engineers after consideration of the matter at Burnap's request by the Secretary of War, a reference of it by him to the Judge Advocate General, and a return of the papers by the Secretary of War to the Chief of Engineers for action in accordance with the Judge Advocate General's suggestions.

The judgment of the Court of Claims is

Affirmed.